

by auction of the channels and orbital locations previously assigned to ACC. Both Commissioners also stated under oath their belief that the Commission's behavior in this regard violated the Communications Act, 47 U.S.C. § 309(j)(7)(A). See Affidavit of James Quello, attached hereto and incorporated herein as Exhibit 3; and Affidavit of Andrew Barrett, attached hereto and incorporated herein as Exhibit 4.

35. Commissioners Quello and Barrett were at the time of the Advanced Order the longest-serving Commissioners with considerable experience deciding DBS issues on behalf of the FCC and were the only Commissioners who had not been appointed by the Clinton Administration.

36. These Affidavits from two former Commissioners who participated directly in the decisions at issue provide compelling evidence to support Advanced's claim that the FCC acted unlawfully in denying its extension request. Both of these Commissioners were sitting officials at the time the application was decided by the FCC and appealed to this Court, and only subsequently stepped down from that office. This evidence would not reasonably have been available in the original FCC proceedings or at the time Advanced took its direct appeal to the D.C. Court of Appeals.

37. Both former Commissioner Quello and former Commissioner Barrett are well-respected public servants with long experience in the communications field, including many years of experience at the FCC. Their willingness to provide this sworn testimony demonstrates the seriousness of the issues and the extent of the unfairness and illegality to which Advanced was subjected before the FCC. Advanced submits that these affidavits warrant the immediate reopening of this case so that the FCC may properly consider the issues in Advanced's original application for an extension.

38. In addition to the Affidavits of former Commissioners Quello and Barrett, subsequent events before the FCC further evidence the irregularity of the proceedings on Advanced's extension request. Since that order was issued, the FCC has continued its routine practice to grant such DBS extension requests. Indeed, since USSB and Dominion Video were granted second extension requests in 1992 and 1993, the FCC has now waived all DBS due diligence requirements for these parties. See In re Dominion Video Satellite, Inc., 14 FCC Rcd. 8182 (Int'l Bureau 1999); In re USSB, 14 FCC Rcd. 4585 (Int'l Bureau 1999). Only Tempo Satellite, Inc., has had any portion of an extension application denied. In that case, Tempo had applied for an extension for two of its orbital locations; the FCC granted the extension sought as to the more desirable location, denying the rest of the extension only because Tempo had not even argued that it had made any progress at the other location. In re Tempo Satellite, Inc., 13 FCC Rcd. 11,068 (Int'l Bureau 1998).

39. Advanced has not made conclusory or generalized assertions of unspecified improprieties, but has presented evidence including sworn testimony of the decisionmaking officials themselves supporting its allegations that there was fundamental illegality in the agency decisionmaking process. This proof is sufficient cause to reopen the case and determine whether the Advanced Order was illegal and void

III. GROUNDS FOR RELIEF

A. Violation of the Communications Act

40. All of the foregoing allegations are incorporated in, and made a part of, this claim. As a preliminary matter, it is a "fundamental principle that federal agencies must obey all federal laws" NextWave Personal Communications, Inc. v. F.C.C., 254 F.3d 130, 133 (D.C. Cir. 2001).

41. The Communications Act provides that the FCC "may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection." 47 U.S.C. § 309(j)(7).

42. Here, the decisive vote to issue the Advanced Order was based on the expectation of Federal revenues to be derived from the auction of the locations and frequencies originally assigned to Advanced.

43. Thus, the Advanced Order is contrary to law in that it violates the Communications Act, and it was arbitrary and capricious and an abuse of discretion for the FCC to enter that order.

B. The Advanced Order Violates Due Process of Law

44. All of the foregoing allegations are incorporated in, and made a part of, this claim.

45. The Due Process Clause of the United States Constitution entitles a person to an impartial and disinterested tribunal in both civil and criminal cases, including adjudicatory administrative proceedings. Under the Due Process Clause, a Commission that has a "pecuniary interest in the outcome" of proceedings before it, based on its desire to generate revenues for the "coffers of the Commission," does not constitute the unbiased tribunal to which a party is entitled under the Constitution. United Church v. Medical Center Comm'n, 689 F.2d 693,699 (7th Cir. 1982).

46. By exhibiting partiality based on a pecuniary interest in generating revenues that would benefit the FCC, the FCC violated not only the statute but also the Due Process Clause. In addition, Advanced has been afforded no meaningful opportunity, in any forum, to present evidence on its claims, and to respond to the true basis for the Commissioners' decision.

47. In both respects, the Advanced Order is contrary to constitutional right under the Due Process Clause, and it was arbitrary and capricious and an abuse of discretion for the FCC to enter that order.

IV. PRAYER FOR RELIEF

WHEREFORE, Advanced prays that this Commission:

- (1) Reopen the case and permit evidence regarding the illegality of the Advanced Order to be developed and presented to the FCC;
- (2) Declare that the FCC violated its duty, under the Communications Act, to decide upon Advanced's extension request without consideration of the expectation of federal revenues to be generated from auctioning off Advanced's spectrum;
- (3) Declare that the FCC violated its duty, under the Due Process Clause of the United States Constitution, to decide upon Advanced's extension request without consideration of the pecuniary interest in generating revenues from auctioning off Advanced's spectrum;
- (4) Set aside ~~as~~ arbitrary and capricious, an abuse of discretion, contrary to law, contrary to constitutional right, and/or in excess of statutory authority, the FCC's order issued October 18, 1995, denying Advanced's request for an extension of time in which to construct, launch, and operate its DBS system;
- (5) Adjudicate Advanced's extension request without any consideration regarding auction revenues, in an impartial manner, and in compliance with all other applicable laws;
- (6) Stay the proceedings regarding the EchoStar acquisition of DirecTV, FCC Docket No. 01-348, until such time as Advanced's extension request has been properly

adjudicated because Echostar presently has the DBS license that formerly belonged to Advanced; and

- (7) Award all other proper relief to which Advanced may be entitled.

Respectfully submitted,

/s/ Original signed by Kathleen L. Beggs

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Gerald H. Taylor
President and Chief Operating Officer

October 10, 1995

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

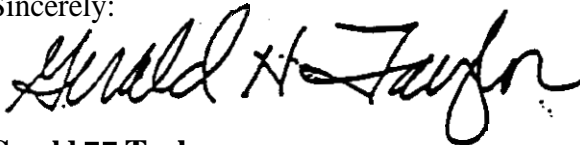
Re: Advanced Communications Corporation
FCC File No. DES-94-11EXT et al.

Dear Chairman Hundt:

As you know, MCI and others have urged the Commission to place the 27 DBS transponders at 110 degrees West Longitude on public auction. MCI reaffirms its commitment to participate in the auction and will submit an opening bid of \$175 million.

MCI has no interest whatsoever in bidding on the 11 channels currently assigned to Tempo at 119 degrees West Longitude because they will not support the type of services MCI plans to provide.

Sincerely:



Gerald H Taylor

cc: Commissioner Quello
Commissioner Barrett
Commissioner Ness
Commissioner Chong

EXHIBIT 1

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*CORRECTED

FCC 95-428

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
Advanced Communications Corporation)	
Application for Extension of Time to Construct, Launch, and Operate a Direct Broadcast Satellite System)	File Nos. DBS-94-11EXT
Application for Consent to Assign Direct Broadcast Satellite Construction Permit from Advanced Communications Corporation to Tempo DBS, Inc.)	DBS-94-15ACP
Application for Modification of Direct Broadcast Satellite Service Construction Permit)	DBS-94-16MP

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1995

Released: October 18, 1995

- By the Commission: *Commissioner Quello dissenting and issuing a statement;*
Commissioner Barrett dissenting and issuing a statement;
Commissioners Ness and Chong issuing separate statements.

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I. INTRODUCTION

1. Before us are several Applications for Review of a Memorandum Opinion and Order issued by the International Bureau that: (1) denied Advanced Communications Corporation ("ACC") an extension of time in which to construct, launch, and operate its Direct Broadcast Satellite ("DBS") system; and (2) dismissed as moot ACC's applications for consent to assign its DBS construction permit to Tempo DBS, Inc. and to modify its permit to conform to the specifications of satellites currently under construction for Tempo Satellite, Inc.¹⁴ Tempo Satellite is an affiliate of Tempo DBS and a current DBS permittee; both Tempo Satellite and Tempo DBS are wholly owned by Tele-Communications, Inc. ("TCI"), the country's largest cable multiple systems operator ("MSO"). These Applications for Review have been opposed by a number of parties, including most other DBS permittees.

2. We affirm the International Bureau's finding that ACC failed to meet its due diligence obligation of proceeding expeditiously with construction and launch of its DBS system. In 1984, the Commission assigned to ACC scarce public resources -- orbital positions and channels -- at no cost, requiring only that ACC proceed with due diligence to provide the DBS service it had promised. As the Bureau found, after more than a decade, including one four-year extension of time, ACC has not met the Commission's due diligence standards. Accordingly, we affirm the Bureau's decision to cancel ACC's construction permit. Because we deny the extension requested by ACC, its assignment and modification

¹⁴ *Advanced Communications Corp.*, 77 Rad. Reg. 2d (P&F) 1160 (DA 95-944, April 27, 1995) ("Bureau Order").

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applications have been rendered moot, and thus will be dismissed. The channels and orbital locations previously assigned to ACC will therefore revert to the public for reassignment.

3. With this decision, we also announce that before the end of this month we will initiate a rulemaking to establish a new methodology for reassigning DBS channels and orbital positions that become available as a result of either cancellation by the Commission or surrender by permittees. Our thinking at this point is that opening a window for new applications for DBS authorizations for these channels (and orbital positions), and then deciding among mutually exclusive applications by auction, will best serve the public interest. Since one of our primary goals is to expedite the provision of additional DBS service in order to foster competition both among DBS providers and between DBS and cable, we intend to meet the following timetable:

October 27, 1995	Notice of Proposed Rulemaking issued
December 12, 1995	Final Report & Order issued
January 17, 1996	New rules become effective
January 18, 1996	Channels reassigned; if competitive bidding chosen, auction begun and completed in one day

This is an ambitious timetable, but we are committed to achieving an expedited reassignment in order to minimize or avoid altogether any disruption in the development of the DBS service or in the business plans of those eager to participate in that development. By devising and implementing a system for reassigning ACC's channels within three months, we will resolve the reassignment issue in time for any potential recipient of those channels to proceed with its business plans with little or no interruption.

4. In making this decision, we also deny a request by EchoStar Satellite Corporation for an investigation of and sanctions for alleged improper and undisclosed *ex parte* contacts in this proceeding.²² Since the prohibited *ex parte* presentations were promptly disclosed once their significance became known, and since the arguments made in those presentations have been raised by petitioners in this proceeding and fully addressed by EchoStar and other opponents, we conclude that no harmful prejudice has occurred.

²² In both its Opposition and in a June 13, 1995 letter to the Managing Director, EchoStar requested, *inter alia*, an investigation into whether additional undisclosed prohibited *ex parte* communications had occurred in the proceeding, and for imposition of sanctions against those who have already admitted to making such prohibited communications.

II. BACKGROUND

A. The Evolution of the DBS Service

5. In 1982, we granted the first authorizations for DBS service — satellite systems that would deliver video programming "direct to home" via backyard receiving dishes.²² Our primary goals in initiating this new service were to provide additional competition to existing program providers such as cable television, to provide improved service to remote areas of the country, and to encourage innovative new programming and services.²³ DBS operators would transmit satellite signals from one or more of the eight orbital positions allocated to the United States pursuant to the Region 2 Plan adopted at the 1983 Regional Administrative Radio Conference ("RARC-83").²⁴ Thirty-two channels were available for use at each orbital location. With digital compression, each such "channel" currently can yield up to six channels of consumer programming.

6. Pursuant to our DBS rules and in lieu of stringent financial showings and subsequent Commission analysis, each DBS permittee must satisfy a two-prong due diligence requirement before a DBS license can be awarded.²⁵ The first prong of our due diligence requirement mandates that each DBS permittee must begin construction or complete contracting for construction of its system within one year of grant of its construction permit. The second prong requires that each permittee must begin operation of its system within six years after receipt of its construction permit. Specific orbital positions and channels are assigned on a first-come, first-served basis upon a determination that the permittee has satisfied the first prong contracting requirement. Thus, specific orbital/channel assignments are made in the order that first-prong due diligence demonstrations are received from

²² Direct Broadcast Satellite Service, 90 F.C.C.2d 676 (1982). DBS is a radiocommunication service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by small, relatively inexpensive earth terminals.

²³ Id. at 680-82.

²⁴ See Processing Procedures Regarding the Direct Broadcast Satellite Service, 95 F.C.C.2d 250 (1983) ("DBS Processing Order"). The Region 2 Plan adopted at RARC-83 allocates orbital positions and channels for use in the Broadcast Satellite Service ("BSS") in the Western hemisphere. The eight U.S. orbital positions, proceeding from east to west, are 61°W.L., 101°W.L., 110°W.L., 119°W.L., 148°W.L., 157°W.L., 166°W.L., and 173°W.L.

²⁵ See 47 C.F.R. § 100.19(b); Direct Broadcast Satellite Service, 90 F.C.C.2d at 719.

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permittees.¹¹ These requirements were intended to permit more orderly processing of applications and to ensure prompt and effective use of DBS spectrum resources.¹²

7. There have been five processing rounds for DBS applicants, the last in 1989. Prior to the last processing round, the limited number of applicants and channels requested, coupled with the flexibility of the international allocation of DBS resources in the Region 2 Plan, allowed us to grant authorizations at variance with that plan.¹³ In the last round of DBS applications, however, requests for orbital/channel resources exceeded the available supply. In our 1989 order in *Continental*, we decided to assign half-CONUS¹⁴ channels only in east/west pairs, so that each applicant could provide full-CONUS service. Service to the eastern half of the United States was to be provided from the four eastern orbital locations, and service to the western half of the country was to be provided from the four western locations. Accordingly, beginning in 1989, new applicants received paired east/west assignments, and existing construction permits were modified to comply with the new assignment scheme. However, we authorized conditional full-CONUS coverage from the eastern orbital positions, provided that such service proved feasible and in keeping with United States treaty obligations.¹⁵

B. ACC's History as a DBS Permittee

8. In 1984, we granted a six-year DBS construction permit to ACC, subject to the condition that it "proceed with the construction of its system with due diligence as defined in Section 100.19 of the Commission's rules."¹⁶ In 1986, we determined that ACC had

¹¹ DBS Processing Order, 95 F.C.C.2d at 253. Permittees apply separately for launch and operational authority once satellite construction is nearly complete. A license to operate a DBS satellite, for a five-year term, may be granted upon successful satellite launch and operation of the DBS service. See, e.g., *Hughes Communications Galaxy, Inc.*, DA 95-979 (May 1, 1995).

¹² DBS Processing Order, 95 F.C.C.2d at 253; see also *CBS, Inc.*, 99 F.C.C.2d 565, 568 (1984).

¹³ For example, we had authorized the operation of two satellites at the same orbital location, with one satellite serving the eastern part of the country and one serving the western part of the country. See *Continental Satellite Corp.*, 4 FCC Rod 6292, 6293 (1989), *partial recon. denied*, 5 FCC Rod 7421 (1990) ("Continental").

¹⁴ Signals from DBS satellites that cover half of the continental United States are referred to as "half-CONUS" signals; those that cover the entire continental United States are referred to as "full-CONUS" signals.

¹⁵ *Continental*, 4 FCC Rod at 6292-93. At that time, the Commission did not have the resources necessary to determine whether full-CONUS service could be provided in technical compliance with the Region 2 Plan. *Id.*

¹⁶ *Satellite Syndicated Systems, Inc.*, 99 F.C.C.2d 1369, 1387 (1984).

satisfied the first prong of the due diligence requirement by contracting for the construction of two satellites.¹⁴ Accordingly, we granted ACC's request for 16 channels at each of two orbital locations: 110° and 148°. In a 1986 application to modify its construction permit, ACC requested assignment of additional channels at these locations. Pursuant to the assignment scheme adopted in *Continental*, we reserved (but did not assign) eleven additional pairs of channels for ACC, conditioned upon ACC's satisfaction of the first prong contract due diligence requirement for this modified DBS system.¹⁵

9. In October 1989, ACC submitted satellite contract information in compliance with the first due diligence requirement for its modified system. In 1990, ACC requested a four-year extension of time, until December 7, 1994, to construct and operate its DBS system. ACC cited "factors outside its control" in support of its extension request: (1) that designs made obsolete by technological advances necessitated numerous modifications; and (2) that changes and uncertainty in the Commission's channel allocation policy had delayed construction. ACC said that it had nonetheless spent "considerable" energy and funds in advancing satellite technology, including DBS digital technology.¹⁶

10. In April 1991, we granted ACC's extension request and assigned ACC 11 additional channels at 110° and 8 additional channels at 148°, based on our determination that it had satisfied the first prong contracting due diligence requirement for its modified system.¹⁷ The due diligence finding was based in part on ACC's contract payment schedule, under which it would have paid 14% of the total contract price by January 1992, 58.5% of the contract price by April 1993, and 83.5% of the contract price by January 1994, at which time its first satellite was scheduled for delivery. In granting the extension request, we specifically stated that "[i]n the future, continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS

authorization," and of the construction

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12. Seven requested consent i turn lease or sell it The proposed assig home fixed satellite high-power DBS se

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¹⁴ *Tempo Enterprises, Inc.*, 1 FCC Red 20, 21-22 (1986) ("Tempo I").

¹⁵ *Continental*, 4 FCC Red at 6304 n.42.

¹⁶ *Id.* at 6301. Thus, the Commission held 11 additional pairs of channels for ACC, which would be given specific assignments if and when ACC demonstrated contracting due diligence with respect to those new channels.

¹⁷ Request for Additional Time to Construct and Launch Direct Broadcast Satellites, DBS-84-01EXT/88-OSMP (filed Feb. 16, 1990).

¹⁸ *Advanced Communications Corp.*, 6 FCC Red 2269, 2272 (1991), *renew denied*, 6 FCC Red 6977 (1991) ("Advanced"). We assigned only eight channels at 148° since no more were available at that location. We denied ACC's request for three channels at 157° because ACC did not complete contracting for a fifth satellite at this location. *Id.* Three channels remain reserved for ACC but not yet assigned.

¹⁹ *Id.* at 2274 (comp

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²² TCI owns twenty- in Princeton are 7 and Newhouse Br- satellite that is one United States v. E

²³ Tempo DBS App.

²⁴ Application for M- 1994, ACC filed a Modification of Co

authorization," and noted that "there does now appear (to be) a need for stricter enforcement of the construction progress requirements of the DBS rules."¹⁸

11. In August 1994, just four months before its construction permit was to expire, ACC requested a second four-year extension of time, based on the following assertions: (1) its three-year negotiation to reach a joint venture agreement; (2) modifications in its system design that delayed construction; (3) the "considerable" funds and "countless" hours expended to implement its system; and (4) regulatory delays in formulating channel assignment policy in Continental which affected the timing of the grant of ACC's modification requests.¹⁹

12. Seven weeks later, or just two months before its permit was to expire, ACC requested consent to assign its DBS construction permit to Tempo DBS,²⁰ which would in turn lease or sell the transponders at the 11C° orbital position to Primestar Partners L.P.²¹ The proposed assignment would permit Primestar's migration from medium-power direct-to-home fixed satellite service ("FSS") using approximately 36 to 40 inch receiving dishes, to high-power DBS service using 18 inch receiving dishes.²²

13. In anticipation of this assignment, ACC also filed an application to modify its permit to conform to the specifications of two satellites being built under Tempo Satellite's DBS permit for an eleven-channel DBS system to be operated at the 119° orbital location.²³ The practical effect of this request is that neither ACC nor Tempo DBS would build the two satellites ACC had contracted to purchase from Martin Marietta that had been the basis for ACC's due diligence showings. Instead, ACC or Tempo DBS would use two satellites being built for Tempo Satellite under Tempo Satellite's construction permit. ACC asked the

¹⁸ *Id.* at 2274 (emphasis added).

¹⁹ Request for Additional Time to Construct and Launch Direct Broadcast Satellites, DBS-94-01/94-11EXT (August 8, 1994).

²⁰ Request for Consent to Assign DBS Authorizations, DBS-94-15ACP (September 28, 1994).

²¹ TCI owns twenty-two percent of Primestar. The cable system operators that have ownership interests in Primestar are TCI, Time Warner, Inc., Cox Enterprises, Comcast Cable, Continental Cablevision, and Newhouse Broadcasting Corporation. GE American Communications, Inc., which owns the satellite that is currently used to provide Primestar service, is also an equity partner in Primestar. See United States v. Primestar Partners, L.P., 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994).

²² Tempo DBS App. for Review at 22.

²³ Application for Modification of Construction Permit, DBS-94-16MP (October 14, 1994). In November 1994, ACC filed an amendment to this modification request. Amendment of Application for Modification of Construction Permit, DBS-94-16MP (November 16, 1994).

Commission to give it credit for Tempo Satellite's efforts in determining whether ACC had met its due diligence obligations.²⁴

14. Included with ACC's assignment application was a Capacity Purchase Agreement ("CPA") between ACC and TCI. Under the CPA, TCI would provide ACC with the two satellites being built for Tempo Satellite, and pay over \$45,000,000 in TCI common stock along with other monetary incentives. In return, ACC would irrevocably sell all of its rights to the transponder capacity on those satellites. This agreement was an alternative to the outright assignment of ACC's construction permit to Tempo DBS.²⁵

15. In April 1995, the International Bureau found that ACC had failed to comply with its due diligence obligations, and therefore denied ACC's request for extension of time to begin DBS operations.²⁶ The Bureau concluded that ACC's failure to make any significant progress toward the launch and operation of its DBS system was the result of ACC's own business decisions, and that ACC also could not rely upon Tempo Satellite's investment in its satellites to satisfy ACC's due diligence obligations. Accordingly, ACC's DBS construction permit was cancelled, and its requests to assign and modify its permit were deemed moot.²⁷ ACC and others have filed Applications for Review of that decision by the Commission,²⁸ and these applications are opposed.²⁹

²⁴ See, e.g., ACC's Consolidated Opp. to Petitions to Deny at 15-18 (filed Nov. 23, 1994).

²⁵ ACC App. for Review at 19; Tempo DBS App. for Review at 3 n.4, 6 n.10.

²⁶ Bureau Order at ¶¶ 9-19.

²⁷ *Id.* at ¶¶ 20-21.

²⁸ The following parties filed Applications for Review ("App. for Review") on May 22, 1995: ACC; Tempo DBS, Inc.; Primetel Partners L.P.; General Instruments Corporation ("GIC"); and Cable Telecommunications Association ("CATA"). Some or all of these parties may be collectively referred to as "petitioners."

²⁹ Dominion Video Satellite, Inc. filed an Opposition ("Opp.") to the Applications for Review on May 26, 1995. The following parties filed Oppositions on June 6, 1995: EchoStar Satellite Corporation; Directus Corporation; DIRECTV, Inc.; MCI Telecommunications Corporation; Entertainment Made Convenient (Emc²) U.S.A., Inc.; Consumer Federation of America and the Center for Media Education; and the National Rural Telecommunications Cooperative. United States Satellite Broadcasting Company ("USSB") also filed Comments on the same date. Others filed informal comments in this proceeding as well. Some or all of these parties may be collectively referred to as "opponents." Also, as noted above, on June 13, 1995, EchoStar requested that the Managing Director undertake an investigation to determine whether any additional *ex parte* communications not permitted under our rules had occurred, and requested that sanctions be imposed against those who had admittedly engaged in prohibited presentations. The Managing Director has referred this matter to the full Commission. We address this matter in ¶¶ 75-79, *infra*.

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16. DIRECTV asserts that CATA, GIC, and Primestar lack standing in this proceeding. None of these petitioners participated in the first stage of this proceeding. In such circumstances, Section 1.106(b)(1) of our rules, 47 C.F.R. §1.106(b)(1), requires that they "show good reason why it was not possible for [them] to participate in the earlier stages of the proceeding." These three petitioners have not made this showing, and their respective applications for review will be dismissed. All of their arguments have been raised by the other petitioners, however, and so are addressed in full.

III. DISCUSSION

17. In support of their Applications for Review, petitioners argue, as detailed below, that the Bureau Order: (1) exceeds the Bureau's delegated authority; (2) conflicts with Commission precedent for considering due diligence and requests for extension of time; and (3) contravenes the Commission's goal of prompt initiation of competitive DBS service.²² To the contrary, we find that the Bureau did not exceed its delegated authority, and it correctly applied Commission precedent in holding that ACC had failed to meet its due diligence obligations.

A. Due Diligence Obligations

1. Delegated Authority.

18. Petitioners contend that the Bureau exceeded its delegated authority in denying ACC's application for an extension of time.²³ They assert that the Bureau Order constitutes an "unprecedented and inexplicable" break with Commission precedent, since it is the first time that a DBS construction permit has been cancelled based on a permittee's failure to meet the second prong of the due diligence rule.²⁴ For the reasons stated below, we find that the Bureau's action was consistent with our precedent.²⁵

²² ACC App. for Review at 11, 18; Tempo DBS App. for Review at 11-24.

²³ Pursuant to Section 0.261 of the Commission's Rules, 47 C.F.R. § 0.261, the Chief of the International Bureau is delegated a wide range of authority to perform most of the functions of the bureau, which include "administer[ing] policies . . . [for] domestic and international satellite systems" and "monitor[ing] compliance with the terms and conditions of authorizations" such as those at issue in this proceeding. See 47 C.F.R. § 0.51(c)-(d). This delegated authority is subject to specific limitations that preclude action on applications that present novel questions of fact, law, or policy that cannot be resolved under outstanding precedents or guidelines, or that appear to justify a change in Commission policy. *Id.* at § 0.261(b).

²⁴ See, e.g., ACC App. for Review at 1, 12-14; Tempo DBS App. for Review at 11-13.

²⁵ In addition, we note that since we are now deciding this case on the merits, the issue of whether the Bureau exceeded its delegated authority is moot.

19. At the inception of DBS service, the Commission established a minimal number of rules designed to foster the development of the fledgling service.³⁴ The Commission determined that the public interest would best be served by affording DBS permittees maximum flexibility in order to facilitate the introduction of a new service that was untried and unproven, both technically and financially.³⁵ Among the few rules imposed was the two-part due diligence requirement, to which exceptions would be allowed only in the "most extraordinary circumstances."³⁶

20. Under the first prong of our due diligence rule, we have taken action against applicants who failed to go forward with the construction of a DBS system. Since the rule "was intended to ensure the prompt initiation of DBS service for the public," we said that it "must be enforced where permittees are allowed to hold spectrum resource for which other applicants exist."³⁷ As a result, between 1984 and 1989, a total of seven permittees were stripped of their permits for failure to comply with the first due diligence requirement.³⁸ In addition, we recently cancelled the orbital positions and channels (but not the construction permit) assigned to Dominion Video Satellite, Inc. for failure to demonstrate compliance the first due diligence requirement in a timely manner.³⁹

21. Nevertheless, throughout the first decade of DBS's existence — what we have previously described as the "pioneering era" of this service⁴⁰ — the Commission exercised flexibility where the public interest so required. The Commission was reluctant to cancel construction permits for failure to initiate DBS service "in accord with a pre-established timetable set without the benefit of experience."⁴¹ For example, in granting ACC's first four-year extension, we based our decision on the substantial developments in DBS satellite technology, the Commission's development of its policy regarding channel and orbital

³⁴ There are only nine regulations directly applicable to DBS service. See 47 C.F.R. Part 100.

³⁵ Direct Broadcast Satellite Service, 90 F.C.C.2d at 706-08.

³⁶ DBS Processing Order, 95 F.C.C.2d at 254.

³⁷ CBS, Inc., 99 F.C.C.2d at 571-72.

³⁸ See CBS, Inc., 99 F.C.C.2d at 566, 571-73 (CBS and Graphic Scanning Corp.); Tempo I, 1 FCC Red at 21 (NECSAT); RCA American Communications, Inc., 2 FCC Red 1204, 1205 (1987)(RCA Americom, Antares Satellite Corp., and Digital Paging of Texas, Inc.); Continental, 4 FCC Red at 6296 (1989)(DBSC).

³⁹ Dominion Video Satellite, Inc., 8 FCC Red 6680, 6687 (1993), recon. denied, FCC No. 95-421 (Oct. 5, 1995)("Dominion"). The Dominion decision is discussed more fully in ¶ 25, *infra*.

⁴⁰ E.g., Advanced, 6 FCC Red at 2274.

⁴¹ United States Satellite Broadcasting Co., 3 FCC Red 6858, 6860 (1988)("USSB I").

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⁴² Advanced, 6 FCC

⁴³ USSB I, 3 FCC

⁴⁴ Id.

⁴⁵ Id. at 6859.

⁴⁶ Advanced, 6 FCC

⁴⁷ Id. at 2274.

⁴⁸ DIRECTV is a Communication service, and D

assignments, and the Challenger and Ariane launch vehicle failures of the late 1980's.⁴²² Such factors, which would have been outside any permittee's control, were the type of "extraordinary circumstances" that justified extension.

22. But even as we granted such extensions, we separately cautioned that extensions would be more difficult to obtain in the future. We noted that:

[a]s circumstances have evolved and demand for DBS facilities may be increasing beyond the available supply of orbit/channel resource, there does now appear [to be] a need for stricter enforcement of the construction requirements of the DBS rules.⁴²³

We stated that it is "imperative that inefficient use of DBS assignments, whether intentional or inadvertent, be prevented, particularly if it becomes evident that incumbent permittees are unjustifiably preventing additional promising parties from attempting to deliver DBS services."⁴²⁴ We also explicitly put permittees on notice that uncertainties in or miscalculations of the business climate are not factors beyond permittees' control that could justify an extension, but rather are risks that each permittee must bear alone: "[n]either other existing or potential DBS participants nor the Commission can, or should be expected to, accommodate their mistaken projections or modified expectations."⁴²⁵

23. Four years ago, we said that "DBS continues to be 'unproven as a technology and as a commercial enterprise.'"⁴²⁶ In granting ACC's request for a four-year extension that year, however, we explicitly warned that "[t]here will soon come a time when the pioneering era of the development of DBS technology and service will come to an end."⁴²⁷

24. The last four years have ushered in that new era. Two permittees (DIRECTV⁴²⁸

⁴²² Advanced, 6 FCC Red at 2274.

⁴²³ USSB.L. 3 FCC Red at 6861 (quoted in Advanced, 6 FCC Red at 2274).

⁴²⁴ Id.

⁴²⁵ Id. at 6859.

⁴²⁶ Advanced, 6 FCC Red at 2273 (quoting USSB.L. 3 FCC Red at 6859).

⁴²⁷ Id. at 2274.

⁴²⁸ DIRECTV is a wholly-owned subsidiary of GM Hughes Electronics and an affiliate of Hughes Communications Galaxy, Inc. ("Hughes"). Hughes is a Commission licensee in the high-power DBS service, and DIRECTV is the DBS operating, customer service, and programming acquisition arm of

and USSB) already have their DBS systems in operation, and a third (EchoStar/Directsat) is to launch one satellite this fall and another in 1996. Tempo Satellite is scheduled to launch in June 1996. Under these circumstances, a permittee's inability or unwillingness to proceed with construction of its system weighs even more heavily against allowing it to retain its permit.²⁷

25. ACC argues that the Commission has applied a "flexible policy" as recently as 1993, when we issued our *Dominion* order.²⁸ In that order, we stripped Dominion of its orbital/channel assignments because of its failure over a two-year period to respond to one Commission order and several requests from the staff for information necessary to demonstrate compliance with the first due diligence requirement.²⁹ Dominion's inordinate delay in submitting the required information caused a prejudicial delay of assignments to other DBS permittees who were behind it in the assignment queue. The appropriate sanction in that situation was revocation of Dominion's assignments and sending it to the end of the assignment queue. In the same order, we also extended Dominion's DBS permit based on the "reasonable degree of continuity in [Dominion's] efforts to establish its DBS system."³⁰ We noted that Dominion had developed a financing program, contracted for home receiving equipment, and obtained a contract for launch services -- all part of satisfying the *second* prong of due diligence.³¹ None of the demonstrated progress toward an operational DBS system that justified our flexibility in *Dominion* is present in this case.

26. It is true, however, that the Commission has never denied an extension of time to a DBS permittee for failure to progress toward compliance with the *second* due diligence requirement.³² From this, ACC argues that any decision to take such an action would be an "unprecedented and inexplicable" departure from Commission precedent.³³

Hughes. Both Hughes and DIRECTV are subsidiaries of General Motors.

²⁷ See USSB L. J FCC Red at 6858.

²⁸ See ACC App. for Review at 15.

²⁹ *Dominion*, 3 FCC Red at 6887.

³⁰ *Id.* at 6888.

³¹ *Id.*

³² The Bureau Order erroneously stated that certain language quoted from USSB L. J was used in denying an extension to another DBS permittee. See Bureau Order at ¶ 13 (quoting USSB L. J FCC Red at 6859). This misstatement does not detract from the logic of the order, which was based on the Commission's often-expressed desire for stricter enforcement of due diligence requirements, rather than the outcome of any particular case.

³³ See ACC App. for Review at 1.

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³⁷ *Id.* at 19
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27. We disagree. Consistency with prior precedent is not determined by whether the same outcome has been reached. Rather, it is determined by whether the Commission's rules and orders have been applied faithfully. We have repeatedly expressed our commitment to enforcing the due diligence rules. The fact that others have demonstrated sufficient commitment to justify extensions does not require us to grant every such request. As we explain below, if warranted under the circumstances of this case, we do not consider it a departure from precedent to cancel a DES construction permit based on the permittee's failure to demonstrate sufficient progress toward compliance with the second prong of the due diligence requirement. We now turn to the question of whether the facts of this case justify cancellation of ACC's permit.

2. Application of the Due Diligence Standard

28. As we stated in granting ACC its first extension, "(t)he Commission closely scrutinizes all requests for extensions of time within which to comply with its rules and policies."²⁶ In ruling on a request for extension of time, the Commission must assess the totality of circumstances: "those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public."²⁷ The Bureau concluded from its assessment of the totality of the circumstances that ACC had made little progress in construction, launch, and initiation of a DBS system in the past decade²⁸ — particularly during its four-year extension — and therefore that an extension was not justified.²⁹ Upon close scrutiny of ACC's extension request, we conclude that the Bureau was correct.

29. ACC contends that it has not been "warehousing" its DBS authorizations. ACC has focused its argument upon three areas: (1) the efforts made by ACC in developing its DBS system; (2) the agreement between ACC and TCI for construction and launch of a satellite licensed to ACC; and (3) ACC's negotiations for a joint venture with another DBS permittee, EchoStar. In addition, ACC asserts that the circumstances of this case are indistinguishable from those of two other cases in which the Commission either granted an extension or allowed a transfer of control.³⁰

²⁶ Advanced, 6 FCC Red at 2774.

²⁷ USSR I, 3 FCC Red at 6861.

²⁸ Bureau Order at ¶¶ 13-20.

²⁹ Id. at 19-20 (citing United States Satellite Broadcasting Co., 7 FCC Red 7247 (Vid. Sec. Div. 1992) ("USSB II") and Directsat Corp., 10 FCC Red 88 (1995)). These cases are discussed *infra*, ¶¶ 46-63.

a. ACC's Efforts

30. ACC argues that the Commission should consider its efforts "to make DBS a reality," including: (1) the promotion of digital transmission technology; (2) the development of plans to provide educational programming; (3) advocacy of interactive service by DBS systems; and (4) participation in legislative, regulatory, and publicity efforts to promote the development of DBS.⁶⁰

31. For purposes of our due diligence analysis, we must recognize that *none* of the efforts cited by ACC involves the actual construction of a DBS satellite or arrangement for launch- and operation-related services. While promotional efforts may be *bubble*, those efforts are not an adequate substitute for the concrete progress toward the construction and operation of a DBS system that is required under *our* rules.

32. In the past, we have specifically deemed such generalized efforts toward promoting the DBS service insufficient to satisfy the first due diligence prong. For example, although we "recognize[d] the efforts CBS has made to date in developing DBS and HDTV technology," we held that CBS had not met its due diligence obligation for the simple reason that it did not have a signed contract for the construction of its satellite.⁶¹ Similarly here, without demonstrated concrete progress toward construction and operation of a DBS system, we cannot say that the initial assignment of scarce public resources to ACC continues to be justified.

33. Since 1991, when we cautioned ACC and all other permittees that extensions would be more difficult to obtain in the future,⁶² we have granted extensions on only two occasions. The record in those cases demonstrated that the permittees had made significant progress toward the realization of a DBS system, including substantial monetary investment, arranging for financing for completion and launch of the system, contracting with suppliers of DBS home receiving equipment, and contracting for satellite launch services.⁶³ These are the kinds of indicia of progress that we look for in evaluating an extension application. Neither these nor any comparable indicia are present in this case.

34. ACC asserts that it was the first to advocate the implementation of digital transmission technology, which it began to incorporate into planning for its system as early as

1986.⁶⁴ ACC seeks a standard, noting the n adopt the same techn however, that DIREC we approved ACC's u incorporate digital tra design.⁶⁵ During year head start - fail

35. ACC also compliance with the 6 the due diligence requ contract that provided June 1991, respectivel showing for its 11 add its first satellite by Jul May 1993. ACC sub construction on its fir it was originally supp approximately Septem contract that set April new date for *beginning*; ACC states that it *paid Phase*," nonetheless it the first due diligence

⁶⁰ *Id.* at 6-8.

⁶¹ *CBS Inc.*, 98 F.C.C.2d at 1069.

⁶² See *Advanced*, 6 FCC Red at 2274.

⁶³ See *Dominion*, 8 FCC Red at 6688; *USSB II*, 7 FCC Red at 7251.

⁶⁴ ACC App. for Re

⁶⁵ *Id.* at 6-7.

⁶⁶ See *Hughes' Appl Regarding Compli 1991*; *Hughes Co*

⁶⁷ ACC App. for Re

⁶⁸ See *Temco, L. I P*

⁶⁹ See ACC Semi-A:

⁷⁰ See ACC Semi-A:

⁷¹ See ACC Semi-A:

1986.⁶⁴ ACC seeks credit for persevering in its efforts to drag the industry to this higher standard, noting the resistance of other permittees such as DIRECTV that ultimately came to adopt the same technology.⁶⁵ We do not disparage these efforts. It is more notable, however, that DIRECTV, which originally opposed this technology, had sufficient time since we approved ACC's use of digital technology in 1991 not only to change its design to incorporate digital transmission, but also to construct and launch a satellite based on that design.⁶⁶ During the same three year period, ACC – which by its own admission had a five-year head start – failed to progress toward the realization of its DBS system.

35. ACC also argues that the Bureau erroneously ignored ACC's continued compliance with the first due diligence requirement.⁶⁷ In order to satisfy the first prong of the due diligence requirement for its first 16 paired channels, ACC submitted a construction contract that provided for complete construction of its two satellites by December 1990 and June 1991, respectively.⁶⁸ After our order in *Continental*, ACC filed a due diligence showing for its 11 additional paired channels in October 1989 that provided for completion of its first satellite by June 1993, which six months later was revised to January 1994.⁶⁹ But in May 1993, ACC submitted an amended contract with an updated timetable showing that construction on its first satellite would not begin until October 1993 (almost three years after it was originally supposed to be finished), with progress payments stretching until approximately September 1995.⁷⁰ In April 1994, ACC submitted yet another amended contract that set April 1995 (four and a half years after the original completion date) as the new date for *beginning* construction, with progress payments stretching until March 1998.⁷¹ ACC states that it paid some still undisclosed amount for the "Systems Design and Definition Phase," nonetheless it has not made any progress payments for actual construction. Meeting the first due diligence requirement does not justify failing to fulfill the second. Otherwise,

⁶⁴ ACC App. for Review at 6.

⁶⁵ *Id.* at 6-7.

⁶⁶ See Hughes' Application for Minor Modification of Construction Permit and Technical Showing Regarding Compliance with International Requirements, FCC File No. DBS-91-02MP/Minor (July 15, 1991); Hughes Communications Galaxy, Inc., 8 FCC Rod 8116 (1993)(launch authorization).

⁶⁷ ACC App. for Review at 12.

⁶⁸ See *Tempe*, 1 FCC Rod at 21.

⁶⁹ See ACC Semi-Annual Report (dated April 4, 1990); *Advanced*, 6 FCC Rod at 2270-72.

⁷⁰ See ACC Semi-Annual Report (dated May 10, 1993).

⁷¹ See ACC Semi-Annual Report (dated April 27, 1994).

permittees could extend indefinitely their nonperformance by repeated modifications of their proposals. As we previously advised ACC, "construction must begin at some point."²²

36. In granting ACC its first four-year extension, we recognized that practical impediments beyond ACC's control justified flexibility. However, as ACC acknowledges, it has had at least three years since the Commission definitively established the orbital locations and technical parameters of ACC's permit.²³ ACC has cited no factors outside its control to explain its lack of significant progress toward construction and launch of its satellites over that period, which comprised almost all of the four-year extension we previously granted. Due to its extended inaction and apparent lack of commitment to operating its own system, ACC is not much closer to the threshold of providing service than any non-permittee,²⁴ and thus has no claim to any comparative advantage that could justify an extension.²⁵

37. The bottom line is that ACC has not achieved any concrete progress toward the actual construction and operation of its DBS system. While its other activities may be laudable, our precedents make it clear that diligent progress toward actual operation which must be the touchstone for our analysis of whether to grant an extension.

b. The ACC/TCI Capacity Purchase Agreement

38. In their Applications for Review, petitioners assert that the Bureau ignored the Capacity Purchase Agreement ("CPA"), which they characterize as a binding contract for the launch, deployment, and operation of satellites by ACC. They further aver that the \$250 million spent by Tempo Satellite on the satellites TCI agreed to provide to ACC should be attributed to ACC, and that it is TCI that is contributing to ACC's DBS program "not the other way around."²⁶

39. Under the CPA, ACC would not pay for the construction, the launch, or the operation of any DBS satellites. ACC would not own any satellites. Its sole contribution would be the FCC permit. Indeed, the CPA provided for the complete and immediate liquidation and dissolution of ACC upon the consummation of this "sale" of transponder

²² Tempo I, 1 FCC Red at 20.

²³ See ACC App. for Review at 9-10.

²⁴ See USSFL, 3 FCC Red at 6860. ACC's reliance on the CPA to support its "threshold" argument is specious; any other entity that had been assigned ACC's channels and orbital locations could enter into the same agreement and instantly be just as close to initiating service as is ACC. See discussion of the CPA in Section III.A.2.b, *infra*.

²⁵ See ACC App. for Review at 19; Tempo DBS App. for Review at 7-10. The CPA was not submitted as part of original extension application, but rather as part of the assignment application filed seven weeks later -- just before the end of its four-year extension.

capacity.²⁸ In these circumstances, an arrangement by ACC system.²⁹

40. TCI, by contract transaction and subsequent pay all costs for the "design the satellite," and would launch and paying for appropriate satellite, and for performance

41. ACC's assertion construction and operation on the fact that ACC's sole use public resources. But operation of the DBS system only has ACC contracted CPA,³⁰ but it has also agreed the two satellites for which Satellite's due diligence pr This agreement cannot be

²⁸ See CPA at § 2.3. Up Garper. *Id.* at § 9.1.2.

²⁹ Some opponents assert control from ACC to TCI case on due diligence pr

³⁰ See CPA at §§ 3.1, 3.3 satellites are "subject to not lessen the interference virtually all relevant as"

³¹ *Id.* at § 3.4. In addition operation, TCI also agreed Garper, in the amount of of Class A common stock Recital C and § 2.2. To him \$30,000 per month Plan of Reorganization

³² See CPA at § 2.1.

³³ See Tempo Satellite's Sr

capacity.²⁴ In these circumstances, the CPA cannot fairly be characterized by petitioners as an arrangement by ACC for the launch, deployment, and operation of its own satellite system.²⁵

40. TCI, by contrast, would be responsible for virtually every aspect of the transaction and subsequent operation of the DBS system. Pursuant to the CPA, TCI would pay all costs for the "design, construction, launch, deployment, operation, and insurance of the satellite," and would be its actual owner.²⁶ TCI would also be responsible for arranging and paying for appropriate facilities for tracking, telemetry, and control ("TT&C") of the satellite, and for performance of the TT&C functions once in operation.²⁷

41. ACC's assertion that the CPA demonstrates significant progress toward its construction and operation of its DBS system is not persuasive. The staff correctly focused on the fact that ACC's sole contribution to this DBS system appears to be its authorization to use public resources. *Bureau Order* at 6 n.24. ACC will have no part in the ongoing operation of the DBS system that will use its 27 channels at the 110° orbital location. Not only has ACC contracted away all control over the use of those channels as part of the CPA,²⁸ but it has also agreed to immediately dissolve as part of the transaction. Moreover, the two satellites for which ACC seeks due diligence credit are currently part of Tempo Satellite's due diligence progress toward construction and operation of its DBS system.²⁹ This agreement cannot be characterized as a demonstration of ACC's due diligence.

²⁴ See CPA at § 2.3. Upon dissolution, ACC would transfer its permit to its sole shareholder, Daniel Garner. *Id.* at § 9.1.2.

²⁵ Some opponents assert that the CPA transaction would result in an unauthorized *de facto* transfer of control from ACC to TCI. See *DIRECTV* Opp. at 11; *EchoStar* Opp. at 10. Our resolution of this case on due diligence grounds has rendered that contention moot, and therefore we do not reach it.

²⁶ See CPA at §§ 3.1, 3.3. The CPA provides that TCI's services in constructing and operating the satellites are "subject to ACC's ultimate control as holder of the FCC Authorization." *Id.* This does not lessen the inference that TCI, and not ACC, was to be responsible for paying for and providing virtually all relevant aspects of DBS operations.

²⁷ *Id.* at § 3.4. In addition to providing one or more satellites and all related services necessary to their operation, TCI also agreed to: (1) make a non-refundable payment to ACC's sole shareholder, Daniel Garner, in the amount of \$600,000; and (2) deliver to ACC certificates representing 2,000,000 shares of Class A common stock of TCI, with a current market value in excess of \$45,000,000. See CPA at Recital C and § 2.2. TCI also made an interest-free loan of \$2,000,000 to Garner, and has been paying him \$30,000 per month since October 1994 for his services as a consultant. See ACC Agreement and Plan of Reorganization at § 3.4; Consulting Agreement at § 2(a).

²⁸ See CPA at § 2.1.

²⁹ See Tempo Satellite's Semi-Annual Report at 1 (dated May 18, 1995).

42. ACC also faults the Bureau for considering the extension request apart from the modification application and the assignment application, since the Commission assertedly "eschewed such a piecemeal approach" in USSB II.⁸²¹ ACC's argument ignores a critical part of our reasoning in USSB II. Although the Commission found that granting USSB's extension and modification requests would serve the public interest, in order to grant them we first had to determine that USSB was in compliance with its due diligence obligations.⁸²² Here, in contrast, the Bureau conducted its compliance analysis first, and its conclusion obviated the need for any further inquiry into the merits of the modification and assignment applications. This approach conforms fully with the Commission's longstanding policies on assignment of authorizations.⁸²³ In any event, reliance upon the proposed assignment to justify an extension would be futile, since our rules in the DBS service specifically provide that "[t]ransfer of control of the construction permit shall not be considered to justify extension of these [due diligence] deadlines."⁸²⁴

c. *Negotiations with EchoStar*

43. ACC also cites as grounds for an extension its efforts from early 1992 to late 1994 to form a joint venture with another DBS permittee, EchoStar — efforts that ultimately proved unsuccessful.⁸²⁵ During those negotiations, ACC initially amended its construction contract to delay the start of construction on its first satellite until October 1993, and then delayed the start date until April 1995.⁸²⁶

⁸²¹ See ACC App. for Review at 19 (citing USSB II, 7 FCC Rod at 7249).

⁸²² USSB II, 7 FCC Rod at 7250.

⁸²³ See *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (1964) (proposed assignment will not be considered until the Commission has determined that the assignor has not forfeited its authorization).

⁸²⁴ See 47 C.F.R. § 100.19(b).

⁸²⁵ See ACC App. for Review at 10-11. In progress reports to the Commission, ACC said, in April 1992, that it was engaged in "serious negotiations" that it expected to complete in "the next month or two." In August 1992, ACC reported it had signed a letter of intent that called for execution of an agreement within sixty days. In October 1992, ACC explained that negotiations were continuing, and in April 1993, stated it expected to reach an agreement within the next month. In May 1993, it reported it was still in "complex negotiations," and in October 1993, it claimed that negotiations were continuing. However, on December 30, 1994, ACC indicated that negotiations had failed.

⁸²⁶ See § 35, *supra*.

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44. We note that for over three years prior to its extension request, ACC had enough channels in a prime orbital location to create a robust DBS system.⁸⁸ ACC nonetheless made a business decision to put off construction of its own satellites for three years while it negotiated to form a joint venture. That decision was ACC's to make, but it must bear the consequences of its actions in failing to proceed toward the launch and operation of its system during an extended period.

45. As the Bureau noted, the Commission has previously found that on-going negotiations do not justify an extension of DBS due diligence milestones: "failure to attract investors, an uncertain business situation, or an unfavorable business climate in general have never been adequate excuses for failure (to) meet a construction timetable in other satellite services."⁸⁹ Accordingly, failed negotiations, and the associated delays they may entail, cannot provide *any* greater justification. These negotiations do not constitute adequate justification for the requested extension.

3. *Commission Precedent*

46. Petitioners also contend that the denial of ACC's assignment application directly conflicts with Commission precedent approving mergers and buyouts of DBS permittees. Specifically, petitioners argue that our actions in approving the sale of transponders from DIRECTV to USSB,⁹⁰ and the transfer of control of a DBS permit from Directsat Corporation to EchoStar,⁹¹ mandate extension of ACC's construction permit. Upon review of these cases, we believe that neither case mandates such a result.

a. *USSB II*

47. The Commission first granted USSB's DBS construction permit in 1982.⁹² In 1988, we granted a four-year extension of that permit.⁹³ We thereafter determined that USSB had complied with the first prong of the due diligence rules, and in 1990 assigned

⁸⁸ DIRECTV operates with 27 channels. USSB, which has 5 channels, operates independently. Of all existing DBS permittees, only DIRECTV has as many channels as ACC.

⁸⁹ USSB I, 3 FCC Red at 6859.

⁹⁰ See USSB II, 7 FCC Red at 7250-51.

⁹¹ See Directsat Corp., 10 FCC Red 88 (1995).

⁹² See CBS, Inc., 92 F.C.C.2d at 64.

⁹³ See USSB I, 3 FCC Red at 6859-61.